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No. 318.

In the Supreme Court of the United States

October Term, 1946.

LOUISE McGREW MOFFETT and LOUISE McGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants*,

vs.

COMMERCE TRUST COMPANY, a corporation, HELEN WEEDE, B. C. HOWARD, WILLIAM H. KOPP, *Appellees*.

Appeal from the Supreme Court of the State of Missouri.

APPELLEES' REPLY TO "RESPONSE TO 'MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY.'"

and

"APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS."

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In the Supreme Court of the United States

October Term, 1946.

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vs.

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APPELLEES' REPLY TO "RESPONSE TO 'MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY.'"

and

"APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS."

No. 318.

FOREWORD.

In this REPLY we have endeavored to limit our discussion to replying to the following: (1) "RESPONSE TO 'MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNA-

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TION OF POINTS ON WHICH THEY INTEND TO RELY' "; and (2) "APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS," recently filed by appellants.

(Where Referred to herein, Appellants' "Response to 'Motion of Appellees to Strike All or Certain Parts of Appellants' Designation of Points on which they Intend to Rely,' and 'Appellants' Request for a Full Hearing on the Merits' " is Designated as "Response"; Appellees' Motion to Strike All or Certain Parts of Appellants' Statement of Points on which they Intend to Rely, is designated as "Motion"; and Appellants' Brief Opposing Motion to Dismiss or Affirm in accordance with Paragraph 3, Rule 7, is Designated as "Appellants' Brief"; Appellees' Statement Opposing Jurisdiction and Motion to Dismiss or Affirm is Designated herein as "Statement Opposing Jurisdiction.")

I.

This appeal should be dismissed for want of jurisdiction.

The appellees have no power to confer jurisdiction of the appeal on this court, by consent or waiver, and in their Motion (pp. 1, 2) have expressly disclaimed any intention of so doing. Appellants include within their Response a request for permission to present the cause "on its full merits" by brief and oral argument. Their theory is that what they allege to be the subject matter of the controversy is (assertedly) inherently federal (Response, pp. 7, 8, 16-19), and therefore this court may not dismiss the appeal; and that appellees, by the extent of their statement opposing jurisdiction and by the filing of their said motion, in effect have abandoned their claim that this court has no jurisdiction of the appeal, and have

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requested the opportunity to file briefs and to be heard orally on the full case (Response, pp. 8, 9).

The contention that the subject matter of the controversy herein is inherently federal cannot be made except by attempting to patch together several insupportable assumptions having no logical connection with each other. As they are presented in Appellants' Response, these argumentative assumptions (except B below), are only an attempt to rediscuss points covered in their Jurisdictional Statement and Appellants' Brief (cf. said Brief, pp. 30, 31, 48, 49-51, 57, 60, 70-71, 76-78, 92-93), and on which they have no right to be heard again in this court and at this time. Gathering together from here and there in said Response and Appellants' Brief, the component parts of the argument that the subject matter in controversy herein is inherently federal, so as to prevent dismissal for want of a substantial claim to support jurisdiction, we find them as follows:

Appellants' claim as to jurisdiction.

A. Sec. 948, R. S. Mo. 1939, bars any further action, and thus completely forecloses appellants' assertion of their alleged federally-sponsored rights (Response, p. 7, Appellants' Brief, pp. 49, 87, 88).

B. Sec. 652, R. S. Mo. 1939, and R. S. U. S., Sec. 1 (Sec. 1, Title 1, U. S. Code), and the Civil Rights Statutes, R. S. U. S., Secs. 1979, 1980, 1981 (Secs. 43, 47, 48, Title 8, U. S. Code) must be taken together and as one law, under which both appellants now assert they were authorized to sue jointly by and under the Civil Rights Statutes (Response, pp. 16, 18, 19; Appellants' Brief, pp. 30, 31, 32, 59, 61-72).

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This claim B not timely made or preserved for review.

With respect to B above, which raises a very important point as to the issue of jurisdiction or none, we submit that in the first place, this contention was "born out of due time" and was first suggested to the appellants by Point II of Appellees' Statement Opposing Jurisdiction (pp. 22-30, as printed), and taken up by Appellants' Brief, p. 30. Appellants now attempt, improperly, in their statement and designation under paragraph 9, Rule 13, to inject an untimely assignment of error and designate a point unsupported by the record, by asserting their right to sue *jointly* as a part of that afforded them by the Civil Rights Statutes. That contention is not properly before this court and furnishes one of the reasons why our motion should be sustained. We submit that none of the 37 assignments of error, filed with the clerk of the Supreme Court of Missouri, raises the contention that the right to sue *jointly* in this case was afforded appellants by the Civil Rights Statutes.

However, since we would have no other immediate opportunity in the event of a determination by this court adversely to our position, we shall, in proper order, discuss that question herein for the present purpose.

C. That, in addition to denying appellants alleged federal rights by holding Sec. 948, R. S. Mo. 1939, constitutional, the Supreme Court of Missouri held that the Fifth Amended (and Third insufficient) Petition did not state a cause of action, in spite of its disavowal of so holding, thus denying appellants alleged federal rights claimed under the assignments of error held by the court not to be germane to the question whether said petition misjoined plaintiffs or failed to state a joint cause of action; and therefore the case cannot pass off on the then appli-

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cable state law as to misjoinder, before reaching an inherently federal question. (Response, pp. 13, 14, 15, 17; Appellants' Brief, pp. 4, 5, 6, 7, 76.)

Appellants' claim A refuted.

We have already answered A above. Section 948, R. S. Mo. 1939, authorized no judgment which would bar a future action on the same facts, and the judgment rendered was proper thereunder. (Statement Opposing Jurisdiction, pp. 18, 19, 20.)

Appellants' claim B refuted.

With respect to B above, Sec. 652, R. S. Mo. 1939, must be read with Sec. 653 *id.*, and giving them the same legal effect as R. S. U. S., Sec. 1, that whether the singular shall be construed to include the plural must be determined by the evident intent of the statute, taking into consideration its context and the subject matter dealt with.

Sec. 653, R. S. Mo. 1939, provides that the rule of Sec. 652 shall apply "unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction." Clearly, there was "something in the subject" of both the state and federal statutes repugnant to the construction appellants demand. At all times in question both Missouri and the U. S. had independent codes of civil procedure regulating the joinder of parties to actions. Where either state or nation has seen fit in remedial statutes to take cognizance of civil procedure, they have engrafted upon the remedial act a variation from the general rules of procedure. (Statement Opposing Jurisdiction, pp. 24, 26.)

For an instance in Missouri, we note the wrongful Death Statute, designating who may sue. *Cummins* v. *K. C. Public Service Co.*, 334 Mo. 672, l. c. 679, 681, 66 S. W.

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(2d) 920. *Barr* v. *U. S.*, 324 U. S. 83 (Response, p. 18), followed a definite purpose of Congress implicit in the statute to which Sec. 1, R. S. U. S. was applied. It did not attempt to interpolate into the statute an unrelated problem of procedure. The Missouri Supreme Court refused to apply what are now Sections 652, 653, R. S. Mo. 1939, so as to make the Statute of Descents read *wives* and *husbands* of an intestate, *Russell* v. *Nelson*, 317 Mo. 148, l. c. 153, 154; and this court refused to apply Sec. 1, R. S. U. S., so as to authorize branches of a National Bank in Missouri, contrary to local law, holding that the rule as to construing singular to include plural under Sec. 1 *id.* "*obviously* * * * is not one to be applied except where it is *necessary* to carry out the evident intent of the statute" (emphasis added). *First Nat'l Bank* v. *Missouri*, 263 U. S. 640, l. c. 657, 68 L. Ed. 486, l. c. 493. In R. S. U. S., Sec. 1, it is provided that words importing the singular number *may* extend and be applied to several persons or things" unless the context shows that such words were intended to be used in a more limited sense." R. S. U. S., Secs. 1979, 1980 and 1981, are from the Act of April 20, 1871, c. 22, Secs. 1, 2 and 6, respectively, and are *in pari materia*. All deal with aspects of deprivation of civil rights. Sec. 1981 *id.* provides that if death of any party be caused by any such wrong, the *legal representatives* of deceased may recover damages

> "for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased."

Thus the context of Sec. 1981 *id.* shows that the word "person" therein definitely could not include both the legal representative and the widow of the deceased.

The Supreme Court of Missouri has *never* construed

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Secs. 652, 653, R. S. Mo. 1939, as affecting the Code of Civil Procedure on joinder of parties (Statement Opposing Jurisdiction, pp. 23, 26, 27, 29, 30); nor have appellants been able to show that this court has ever made such application of Sec. 1, R. S. U. S., as they seek (Response, pp. 16, 18; Appellants' Brief, pp. 30, 31, 70, 71). They present cases (Response, p. 16) brought in a *U. S. District Court* and governed by the applicable provisions of the Federal Civil Code, permitting joinder (see Rules 20, 21), and *Georgia* v. *Penna. R. Co.*, an original proceeding in this Court, wherein a state sues as quasi-sovereign and protector of its people against a continuing wrong, and to redress wrongs done the state as owner of property and institutions. They also have had recourse to decisions in *class suits in equity*. The alleged accumulated woes of Mrs. Moffett have not transformed her into a class. This is, furthermore, an action at law, not in equity.

There is another insurmountable obstacle to the contention thus made by appellants. In this petition (154-323, using reference in Response, presumably transcript paging) the executrix of the estate of Thomas S. Moffett, deceased (in course of administration) is one party and Louise McGrew Moffett, individually, is the other party, claiming as ultimate sole devisee and distributee of said estate, upon the settlement and distribution thereof, as well as alleged joint owner of property with her deceased husband. The allegation of joint ownership by Mrs. Moffett and her husband was a mere conclusion of law, contradicted by numerous allegations in the petition as the Supreme Court of Missouri held (193 S. W. (2d), l. c. 590) (821, 822). The many allegations of the petition that the individual appellant derived her interest as sole devisee of her husband contradicted and destroyed the allegation as to joint ownership. Conflicting allegations import false-

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hood and inconsistency does not help the pleader. *Losch* v. *Pickett*, 36 Kans., l. c. 222; *Koewing* v. *Bldg. & Loan Ass'n*, 327 Mo. 680, l. c. 689, 38 S. W. (2d) 40.

The alleged interests of the respective appellants herein as present executrix and prospective distributee of the estate are not concurrent but consecutive. The claim against Commerce Trust Company, an appellee herein, with respect to alleged appropriation of part of the Moffett Brothers partnership estate (246 *id.*), of which said Trust Company is administrator, is not one of which the circuit courts of Missouri have cognizance. *Smith* v. *Trust Co.*, 340 Mo. 979, 104 S. W. (2d) 341; *Odom* v. *Langston*, 351 Mo. 609, 173 S. W. (2d) 826; *Wass* v. *Hammontree*, 77 S. W. (2d) 1006, l. c. 1010.

Distributee cannot "by-pass" pending administration.

Title to choses in action and the right to sue thereon are in the personal representative, and heirs or distributees have no right of action either at law or in equity, unless and until they receive the estate in course of administration. Heirs or devisees cannot "by-pass" a pending administration. *Odom* v. *Langston; Wass* v. *Hammontree, supra; Smith* v. *St. L. Union Trust Co.*, 340 Mo. 979, l. c. 984, 104 S. W. (2d) 341; *Bristow* v. *Gage*, 280 U. S. 328, l. c. 334. The executrix appellant could not join a cause of action which she may have, in her individual capacity, with that asserted in the representative capacity. *Mertens* v. *Lowenberg*, 69 Mo. 209; *Niederberg* v. *Golluber*, (Mo.) 162 S. W. (2d) 592, l. c. 599, wherein a widower sued in equity, in his individual capacity and as administrator of his wife's estate. The Niederberg case emphasizes the construction which the Supreme Court of Missouri has also placed upon Sec. 851, R. S. Mo. 1939, cited in Appellants' Brief, p. 80, that all persons must have a

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legal interest in subject matter and relief, who may join as plaintiffs. The court held that the plaintiffs, respectively administrator of the deceased wife's estate and as widower, are not united in interest in their claim for rental value of alleged trust real estate under Sec. 853 *id.*, nor both necessary parties to complete determination of the question involved under Sec. 852 *id.*,

> "nor are both plaintiffs (legally) interested in the subject matter, and in obtaining the relief demanded so as to be properly joined as plaintiffs under Sec. 851, R. S. 1939 Mo."

Kansas statutes do not aid appellants.

Sec. 850 *id.* is the familiar code provision authorizing a personal representative, trustee of an express trust or a person expressly authorized by statute to sue in his own name without joining with him the beneficiary and making "trustee of an express trust" include a party to a contract for benefit of another. Claiming causes of action allegedly arising in *Kansas,* appellants cite Secs. 856-858, R. S. Mo. 1939 (Statement as to Jurisdiction, p. 17), Assignment of Error 24, and quote *Hotchkiss* v. *Ogle,* 153 Kans. 156, l. c. 162 (Appellants' Brief, p. 79), with the comment that the two Kansas Code sections therein mentioned duplicate Secs. 850 and 851, R. S. Mo. 1939. They carefully omit mentioning that the principal object in the Hotchkiss case was *foreclosure of a real estate mortgage;* and that Sec. 60-601, G. S. Kans. 1935, provides that *foreclosures* of mortgages or other liens are an *exception* to the *requirement* that the causes of action united *must affect all parties* to the action.

In *Leinbach* v. *Dyatt,* 112 Kans. 82, l. c. 788, it was held that:

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> "But the rule that only those causes can be joined which affect all the parties does not apply in actions to enforce mortgages or other liens."

Appellants concede the fallacy of their position in joinder when they seek support from foreign authorities which are equally against them. In *Gray* v. *Blight*, (C. C. A.) 112 Fed. (2d) 696, l. c. 698, it is well held that:

> "The law of the jurisdiction by which relief is sought controls as to all matters pertaining to remedial, as distinguished from substantive, rights."

Certiorari thereon was denied 311 U. S. 706. In *Kansas* v. *U. S. F. & G. Co.*, 328 Mo. 295, 40 S. W. (2d) 1050, l. c. 1052, the Supreme Court of Missouri correctly held:

> "The manner of bringing a suit, as in this case, whether properly brought in the name of the obligee named in the bond, or the real party in interest, pertains to the form of remedy * * *. It is therefore controlled by the *lex fori*. Such is the uniform ruling of the various courts."

In *National Mutual Casualty Co.* v. *Blackford*, (Ark.) 141 S. W. (2d) 54, l. c. 56, it is held:

> "Furthermore, we think the right to join the insurer in this case is governed by the law of the forum. It relates to the remedy and is a procedural matter, not one of substance."

In *Hanger* v. *Abbott*, 6 Wallace (73 U. S.) 532, 18 L. Ed. 939, this court said :

> "Proceedings in courts of justice are usually determined by the *lex fori* of the place where the suit is pending * * *."

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Appellees also refer to our Statement Opposing Jurisdiction, II, pages 22-30, as printed.

We submit that under the above cited controlling decisions of this court and of the Supreme Court of Missouri, the belated contention of appellants, that R. S. U. S., Secs. 1979, 1980 and 1981, conferred upon the distinct appellants herein the right to bring and maintain this suit jointly for alleged deprivation of civil rights, is groundless, without substance of color; that it was not timely made; and that the right of joinder must be determined by the law of the forum in which the action under such civil rights statutes is brought, and that the Supreme Court of Missouri correctly declared and applied that law in the instant case. While we regret the length of this presentation, appellants compelled it, by the nature of the Response, pp. 16, 18, 19, and this discussion was vitally necessary to the following discussion of the contention C of appellants as first herein outlined, which next follows.

Appellants' claim C refuted.

Under contention C of appellants as first herein outlined, they assert a federal question in that it is claimed the validity of Sec. 948, R. S. Mo. 1939, as violative of federal law, is drawn in question in the record and that the statute was upheld and that the validity of U. S. R. S., Secs. 1979, 1980 and 1981 was drawn in question by the demurrers of the appellees, and that the opinion of the Supreme Court held said civil rights statutes invalid (Response, pp. 6, 7 and 8). In the endeavor to escape the clear net result that the case was decided on the applicable local rule of practice then in force by dismissal of the Petition for Misjoinder of Plaintiffs with right to bring any other action, and without the involvement of any substantial or colorable federal question, appellants

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must and do make the unfounded contentions that the challenged judgment (a) was final and on the merits, (b) disposed of the case without giving appellants the "hearing" required by law, and (c) denied appellants, not the right to sue under the civil rights statutes, which they claim in the record, but what they now erroneously conceive and belatedly attempt to claim as their right under the civil rights act, to bring and maintain the instant case *jointly* thereunder.

The contentions as to Sec. 948, R. S. Mo. 1939, such as they were, were the only ones having a pretense of constitutional character decided by the Missouri Supreme Court (193 S. W. (2d), l. c. 592, Syll. 10) (826). In Appellants' Brief, p. 48, they practically abandon their contentions as to unconstitutionality of Sec. 948 *id.*, and make it clear that they are now attacking the *application* of this section by the courts, which is not an attack upon its validity at all, and that in their charge as to "penalty" they have no reference to the treble costs provided for by said section. They say (said Brief, p. 48):

> "the manner of its application made Section 948 a mere bill of attainder, and such circumstances contradict the recital in the opinion of the State Supreme Court that said statute was a statute which 'inflicts no penalty without a hearing' (826).
>
> "It may be that, in the abstract, the statute meant just that, but, as applied herein, it inflicted the penalty provided in it without any hearing or opportunity to appellants to be heard. It was this unlawful application of said Section 948 that frustrated the power of either the Circuit Court or the Supreme Court to give appellants any relief under R. S. U. S., 1979, 1980 and 1981, or to award any damages for the deprivation of all the constitutional rights referred to in the record herein, and was the basis of the unlawful denial by the state court of said federal rights."

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The above frankly concedes that it is not Section 948 *id.* as passed by the Missouri Legislature to which appellants have reference. Section 10, Article I of the U. S. Constitution forbids legislative enactment of a bill of attainder. All appellants charge, and groundlessly, is that the trial court failed to carry out the command of the statute by affording a "hearing." Appellants had three complaints as to the matter of hearing: (a) because they contend that the trial court should have determined the correctness of the rulings by other judges on demurrers to previous petitions. The question was not before the trial court and was not preserved in the Supreme Court for the reasons stated in its opinion (193 S. W. (2d), l. c. 591, 592) (824, 825); (b) because the circuit court denied appellants' request for additional time for preparation for argument of the demurrers, under circumstances fully set out in the opinion of the Supreme Court and which justify the action of the trial court (193 S. W. (2d), l. c. 591, Syll. 4) (823, 824), and (c) apparently because the trial court denied their suggestion that the court below hear further presentation *as to whether the Petition stated a cause of action in favor of either plaintiff* (421 Printed Record, Mo. Sup. Ct.; Appellants' Statement as to Jurisdiction, pp. 24, 25). *The trial court had indicated that it had had briefs and argument on the question of misjoinder of plaintiffs and had determined that issue to be so decisive of the case that further briefs and argument would be futile* (421 *id.*, Appellants' Brief, pp. 37, 38).

In Appellants' Brief on page 33 and at the top of page 36 are repeated quotations of a purported recital on page 406 of the Record as printed in the Missouri Supreme Court, reciting that without evidence, notice, hearing or jurisdiction, the circuit court entered the challenged judgment of dismissal. The mentioned paragraph is obviously

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an interpolation by counsel who prepared the record. No court ever stultified itself by authorizing a record of its proceedings to be made, showing that the court was proceeding to enter a judgment without hearing evidence or arguments, and in the absence of notice and jurisdiction to act. Following a procedure authorized by *Yellow Mfg. Acceptance Corp.* v. *American Taxicabs*, 340 Mo. 1200, 130 S. W. (2d) 601, respondents before the Missouri Supreme Court, the appellees here, on or about November 9, 1945 (R. ....), moved to strike the above mentioned paragraph and other recitals of the alleged record on the grounds that same were not true copies of the record and were misleading, argumentative and not in proper form to go into the record, relying upon the American Taxicabs case as authority for such action. The Supreme Court took such motion and a counter motion with the case on the merits (see order made December 3, 1945, R. ....), and in effect upheld present appellees' motion by ruling that the challenged judgment "is correct in form and in accordance with law" (193 S. W. (2d), l. c. 592) (827). No such result could have been reached if that court had considered the interpolation in the record as to lack of evidence, notice, hearing or jurisdiction as a legitimate part of the record in the case.

We have abundantly answered the contentions made in Appellants' Brief, pp. 49, 87, that the challenged judgment was on the merits or a bar to another action (Statement Opposing Jurisdiction, pp. 18, 19). Despite what appellants now say (Response, p. 7) that the *validity* of Sec. 948, R. S. Mo. 1939, was drawn in question, Appellants' Brief at page 48 concedes the validity of that section and, on pages 32, 43, 45, 48, 49 and 51 by continuous reiteration, makes it clear that their real contention is that they were wronged, not by the act of the legislature

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in passing that section, but by the procedure of the courts in applying it. Bearing in mind that when the third defective pleading has been adjudged insufficient, the provisions of that section are "mandatory, leaving no discretion to be exercised by the trial court." *Gordon* v. *Burris*, 125 Mo. 39, l. c. 42, 183 S. W. 191; see also *Beardsley* v. *Morganer*, 73 Mo. 22, it is demonstrated above that appellants were afforded all of the hearing and opportunity for hearing to which they were entitled or which the circumstances of the case made possible; and that as to Sec. 948 *id.*, appellants were not deprived of any relief to which they might have made claim or been entitled under R. S. U. S., Secs. 1979, 1980 and 1981. This is because, as shown above, (a) said civil rights statutes did not confer upon appellants the right to maintain the action jointly; (b) appellants never made any claim of a federal question by reason of an asserted right to maintain their suit *jointly* under the federal rights statutes, in any court or at any time until their posthumous attempt to drag that question into this court by (Appellants' Statement and Designation under Paragraph 9, Rule 13) a point on which they hope to rely, wherein they attempt to assign as error the denial of the alleged right to sue *jointly* under the civil rights statutes, which they had never before asserted, and (c) because the challenged judgment left them free to prosecute any other action on the alleged facts in proper time and form. Thus, any alleged federal question as to Sec. 948 *id.*, besides being unsubstantial and frivolous, has never been preserved for review in this court.

We cannot take leave of Sec. 948 without mentioning the unwarranted aspersions cast upon Trial Judge Ridge by Appellants' Statement as to Jurisdiction, pp. 19 and 20, and in Appellants' Brief, p. 49, top. The court found

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"upon the record" that a third petition of appellants herein had been found insufficient. The suggestions of counsel for the appellees mentioned in the statement as to jurisdiction, pp. 19 and 20, and in Appellants' Brief, pp. 42, 44, were to invite the judicial notice of the court to the rulings on the previous petitions. Those who seek judicial notice must suggest and invite it. *Shapleigh* v. *Mier*, 299 U. S. 468, 81 L. Ed. 355, 57 S. Ct. 261.

As to the statement at top of page 49 of Appellants' Brief, in effect a charge that Trial Judge Ridge by the declaration, "I will just overrule the other grounds of the demurrer" (p. 422, Printed Record, Mo. Supreme Court), indicated he had concluded the petition stated a cause of action under the civil rights statutes. We pointed out above that appellants' counsel (421 *id.*), just previous to that statement, had made the declaration that *the court, not having considered* whether the petition *stated a cause of action*, should hear further presentation of that question *in order to determine it*. This court judicially knows that Judge Ridge has since become a judge of the District Court of the United States for the Western District of Missouri. That the court had determined there was a misjoinder of plaintiffs was sufficient. Appellants' counsel themselves solemnly in open court declared that his conclusions had gone no further (p. 422 *id.*).

Appellants claim (Response, p. 14) that the opinion of the Supreme Court of Missouri (193 S. W. (2d) 588, *et seq.*) (827) by recital "appellants have not been denied due process. They have not only had their day in court, but their months and years," decided "that the only question in the case which constitutes the federal basis of the cause of action does not exist and hence that the pleading does not state a cause of action" (Response, p. 14). Thus they say farewell to their attack upon Sec. 948, R. S. Mo.

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1939; and admit that their alleged inherently federal subject of controversy (p. 8, *id.*) is the denial of rights alleged to be claimed under the *civil rights* statutes. The asserted federal basis is further amplified by the recitals (Response, p. 7, top) that the jurisdictional statement and record disclosed that the validity of U. S. R. S., Secs. 1979, 1980 and 1981, was drawn in question by appellees' demurrers, and that the judgment of the Missouri Supreme Court is, so appellants asserted, a general holding that their Fifth Amended Petition failed to state a cause of action and consequently held said acts of Congress invalid under *U. S.* v. *Sutton,* 215 U. S. 291, 54 L. Ed. 200. That case was before this court on error to a District Court of the United States in a criminal case, to review the sustaining by the trial court of a demurrer to an indictment founded on the Act of January 30, 1897, making it a crime to introduce intoxicating liquors into the Indian country. Since such Act was the basis of the indictment it was properly held that the question whether the indictment charged offense against the United States laws, involved the validity of the Act of January 30, 1897, *as applied where the stated facts were agreed upon;* wherefore, the case was properly before this court under the statute on writs of error in criminal cases.

In connection with the charge that the validity of the civil rights statutes was drawn in question by the demurrers, appellants say (Response, p. 14) that appellees admit the allegations of the petition specifically disclosing that Mrs. Moffett was not accorded due process in the Kansas litigation by the Kansas judge, nor by the Missouri court under color of state laws, in denying *Mrs. Moffett's* attempt to be relieved from the pendency of certain alleged "fictitious" suits for 16 years. This apparently simple statement is elusive and deceptive. Mrs.

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Moffett appears in this case in two capacities, that of widow of her deceased husband and also that of executrix of his estate. Their separate entities and rights are as distinct for legal purposes as if the administration of said estate were in the hands of a corporate fiduciary, representing the creditors of the estate as well as ultimate distributees thereof. Since we will show that this case passed off entirely on the issue of misjoinder of plaintiffs and that same involved no federal question, it is not material as to what allegations of a petition are admitted by demurrer under Missouri law.

Demurrers admitted only well-pleaded ultimate facts.

But to show the fallacy of the argument and the complete lack of relevancy of the question of "admissions," we may say that under Missouri law a demurrer admits only the well-pleaded, ultimate, constitutive, issuable facts, and these do not include statements by the pleader as to foreign law, though in the form of a statement of fact. In *Bushman* v. *Barlow*, 321 Mo. 1052, 15 S. W. (2d) 329, it is held (l. c. 1059, Official Report) that

> "The rule is that only such facts are admitted by a demurrer as are well pleaded."

In *Stonemets* v. *Head*, 248 Mo. 243, l. c. 254, the Supreme Court held:

> "Defendant is entitled to the rule that while his demurrer admits the truth of averments of substantive fact, it does not admit facts not well pleaded, or impossible or absurd averments, or the soundness of mere conclusions of law, or the mere conclusions of the pleader upon the facts constitutive of his cause of action, or mere argumentative matter."

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And in *Odom* v. *Langston*, 351 Mo. 609, l. c. 621, 173 S. W. (2d) 826, held that

> " • • • a demurrer does not admit evidentiary facts or conclusions of law, but only utimate constitutive facts which are well pleaded in the suit on trial. *Hughes* v. *State Board of Health*, 345 Mo. 995, 998 (2), 137 S. W. (2d) 523, 525 (4, 5)."

In *Finney* v. *Guy*, 189 U. S. 335, l. c. 344, 47 L. Ed. 839, l. c. 845, this court held:

> "The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as to evidence of the law. The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right construction to be drawn from them."

Sec. 948, R. S. Mo. 1939, reads:

> "In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

That statute imposes upon the Missouri courts the duty of taking judicial notice, not only of the statute and such decisions as the pleader may choose to set out, but of *all* judicial decisions, of the foreign state, interpreting or construing the statute in question. *Corbett* v. *Terminal R. Ass'n*, 336 Mo. 972, l. c. 980, 82 S. W. (2d) 97. The petition

ruled on herein pleads a multitude of statutes and court decisions of the state of Kansas (Statement Opposing Jurisdiction, p. 73).

Aside from the frivolous and nonsubstantial contentions as to Sec. 948, R. S. Mo. 1939, it was unnecessary for the Supreme Court of Missouri to look beyond the challenged petition to determine the issue of misjoinder of plaintiffs, which was the sole, sufficient and absolutely non-Federal ground upon which it disposed of the case. However, if that court had found it necessary to decide the *other* assignments it had the right, as had the trial court, to consider the opinions and exhibits attached to Appellees' Statement Opposing Jurisdiction (Tr. 1050, 1062), printed pages 110-151. See Statement Opposing Jurisdiction, VII, Judicial Notice 71-78.

No jurisdition in this court.

The answers to the contention by appellants as to alleged jurisdiction of this court are so many and so conclusive that they can be stated briefly.

1. The validity of the U. S. R. S., Secs. 1979, 1980 and 1981, was not drawn in question by the demurrers, which as demonstrated above did not admit the conclusions stated in the Petition that appellants had been denied due process in the Kansas or Missouri courts. In the *U. S.* v. *Sutton, supra,* stating the rule on which appellants rely (Response, p. 7), the validity of the statute defining the offense was held involved in the issue on demurrer because all material facts, including the denounced introduction of intoxicants into the Indian country, were admitted by an agreed statement of facts.

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Validity of Federal Civil Rights Statutes not denied.

2. Furthermore, the point of misjoinder of plaintiffs raised by the demurrers did not and could not involve any decision against the validity of said Federal Civil Rights Statutes, and this was the sole ground of demurrer acted upon by both Circuit and Supreme Courts of the state. As we have shown above, the attempt of appellants to interpret said statutes so as to give an executrix and a devisee, like appellants, the right to sue jointly, as in this action, has signally failed and their belated attempt to rely on such statutes as giving that right, and to maintain that they made a record of and preserved throughout the case their claim to that right, is abortive, belated and futile. The claim of rights, under said U. S. R. S., Secs. 1979, 1980 and 1981, as made in appellants' statement as to jurisdiction or jurisdictional statement under "How Federal Questions Were Raised," pages 5, 10, 11 and 16, printed, shows definitely that their claim was to such rights as said statute sections gave and secured to them. We have demonstrated above that R. S. U. S., Sec. 1, Sec. 952, and Sections 856, 857 and 858, R. S. Mo. 1939 (the latter three sections accrued under the laws of another state, if authorized by such law to bring the action, and if not, those empowered by the laws of such state to sue for the beneficiaries, to maintain action in Missouri), cannot have the effect of making the right to maintain this action *jointly*, one which is given or protected by the Federal Civil Rights Statutes. (See Assignment of Error 24.) The cases cited as holding to the contrary by counsel for appellants in their printed Statement as to Jurisdiction, pages 35, 36, such as *Young* v. *Boatmen's Bank*, 350 Mo. 1157, 171 S. W. (2d) 552, and others, were either cases in which the question of misjoinder was not timely raised, or, as in *Kammeyer* v. *Concordia*, 352 Mo. 742 (34 *id.*),

were class suits in equity, or for other reasons are not authorities. *Armour* v. *Roberts*, 151 Fed. 846 (35 *id.*), cited as a decision by the Circuit Court of Appeals of the Eighth Circuit, was, as opposing counsel well know, decided by an Iowa judge sitting in the Federal District Court, who was excusably ill versed in Missouri practice. Appellants first tardily endeavored to raise a right of joinder claim to ground the jurisdiction of this court, in that part of "Appellants' Statement and Designation under Paragraph 9, Rule 13," entitled "Assignment of Errors," by attempting to make a claim and assign error on the contention that the Federal Civil Rights Statutes gave them the right to maintain this action *jointly*. The alleged error should have been pointed out in the Assignment of Errors filed in the Supreme Court of Missouri, and this claim was properly attacked by Appellees' Motion. This court, in *Flournoy* v. *Wiener*, 321 U. S. 253, l. c. 259, 88 L. Ed. 708, l. c. 731, said:

> "It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider Federal questions not assigned as error or designated in the point to be relied upon even though properly presented to and passed upon by the state court." (Citing many authorities.)

The alleged Federal question of right to sue jointly under the Federal Civil Rights Statutes is not properly before this court. It cannot be considered here.

3. The Supreme Court of Missouri decided this case on the sole ground of misjoinder of plaintiffs, one of state practice entirely, when it said (193 S. W. (2d), l. c. 591 (823, 824):

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> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, * * *. We think the reason assigned by the trial court is sufficient, * * *,"

and added, after making the obiter remark cited by appellants (Response, p. 14), at page 592 (827):

> "None of these assignments is germane to the question whether the Fifth Amended Petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action."

As said by this court in *Parker* v. *McLain*, 237 U. S. 469, 59 L. Ed. 1010-1051, this "was purely a question of local law or practice, and the decision by the Supreme Court of the state is controlling"; and in *Johnson* v. *Drew*, 171 U. S. 93, 43 L. Ed. 88, it was held, as here:

> "The substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice."

The decision of the Missouri Supreme Court had been reached on the point of misjoinder before it even mentioned the assignments of error involving alleged constitutional rights (not pertaining to Sec. 948, R. S. Mo. 1939). The remarks of the court which appellants say (Response, pp. 14, 15) imported a decision upon Federal questions and denial of Federal rights, could not have that effect, since they were *obiter dicta*, and it would be impossible to base *stare decisis* thereon. As said by the Supreme Court of Missouri in *State ex rel. Robb* v. *Shain*, 347 Mo. 928, l. c. 931, and well applicable to the remarks here complained of, the matter is "obiter dictum, because the court had no such situation before it." And in *Humphrey's Exr.* v. *U. S.*, 295 U. S. 602, l. c. 626, 79 L. Ed. 1611, l. c. 1618, this court held:

> "In the course of the opinion of the court, expressions occur which tend to sustain the Government's contention, but these are beyond the point involved, and therefore do not come within the rule of *stare decisis.*"

There was no sardonic import in the remarks of the court that appellants "not only had their day in court, but their months and years," but, rather, genial amusement was aroused in the court when it compared the thought of a "day in court," with the fruitless but repeated progress of the appellants thrice to the Supreme Court of Kansas, to the Federal District and Circuit Appellate Courts, and twice to this court, as revealed in the citations mentioned just preceding the remark as to "months and years."

The very observations of which appellants complain, that they had not been denied due process and had had their months and years in court, are linked by the Missouri Supreme Court with the statement in the following sentence that none of their "many other assignments of error" mentioned in the same paragraph is germane to the question whether the challenged petition contained a misjoinder of plaintiffs or failed to state a joint cause of action, thus saying forcefully that *the point of decision had been passed in the preceding paragraph* (193 S. W. (2d), l. c. 591) (822, 823), in which the court had said that the ground of misjoinder of parties, the sole ground on which the trial court sustained the demurrers, was right and sufficient. In *Choteau* v. *Gibson,* 111 U. S. 200, 28 L. Ed. 400, this court held in sustaining a motion to dismiss a writ of error to the Supreme Court of Missouri for want of jurisdiction that

> "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear

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> affirmative on the face of the record, not only that a Federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case * * * The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The Federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way."

In the instant case, the Federal questions, if any except those raised as to Sec. 948, R. S. Mo. 1939, lay behind the ground of the demurrers that (whatever Federal claims appellants sought to assert), they could not maintain their action jointly. The questions as to Sec. 948 *id.* were non-substantial and frivolous and the remaining Federal questions could not be reached until after the decisions of the point as to misjoinder of plaintiffs was out of the way.

4. Yet if there were any merit to the groundless contention of appellants that the State Supreme Court did decide that the challenged petition alleged no denial of due process and hence failed to state a cause of action so that such decision could be construed as holding R. S. U. S., Secs. 1979, 1980 and 1981 invalid (Response, pp. 7, 14, 15), it would avail appellants nothing.

Fox Film Corp. v. *Muller*, 296 U. S. 207, l. c. 211, 80 L. Ed. 158, l. c. 160, was on certiorari to the Supreme Court of Minnesota to review a judgment of a district court of the state. This court held:

> "The non-Federal question in respect of the construction of the contracts and the Federal question in respect of their validity under the Anti-Trust Act were clearly independent of one another (citing cases). *The case, in effect, was disposed of before*

the Federal question said to be involved was reached (citing cases). *A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.*

Writ dismissed for want of jurisdiction." (Emphasis supplied.)

In *DeSussure* v. *Gaillard*, 127 U. S. 216, l. c. 232, 32 L. Ed. 125, l. c. 131, 132, in error to the Supreme Court of South Carolina, it was held that:

" * * * the Supreme Court of the State of South Carolina in its opinion in this case passed upon the Federal question sought to be raised by the plaintiff as the foundation of his case, and decided adversely to him; but * * * the decision of that question was not necessary to the judgment. Before reaching that question the Supreme Court had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provision of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. That question is not a Federal question; it does not arise under the Constitution of the United States, or under any law or treaty made in pursuance thereof. It is not a question, therefore, which, under this writ of error, we have a right to review * * *

"It is a statute conferring certain rights upon suiters choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances, are questions for the exclusive determination of the state tribunals, whose judgment thereon is not subject to review by this court."

The court then quotes the "well-settled rule" that where the record shows that the judgment below might have

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been based on a law raising a Federal question or alternatively on an independent ground and that the court did in fact base its judgment on the independent ground and not otherwise, this court will not take jurisdiction of the case even though it might think the position of the state court unsound.

Misjoinder sole ground of decision.

The non-Federal question of misjoinder, under the then applicable Missouri Code of Civil Procedure was adequate, was the sole ground of decision relied upon by both the State Circuit and Supreme Courts, after disposal by the Supreme Court of the frivolous and nonsubstantial questions as to Sec. 948, R. S. Mo. 1939; and the announced decision relegated all remaining Federal questions to a position where their decision was unnecessary, and was insufficient to give jurisdiction to this court under the above and many other applicable authorities.

Time will not permit review of the inapplicable authorities cited by appellants in their Statement as to Jurisdiction, pp. 29-32, as printed. It will be found that a number of these could only apply if the appellants were correct instead of in error in their contention that the Supreme Court of Missouri decided that their petition did not state a cause of action and that the decision of the court turned on that point. Such is *Cresswill* v. *Grand Lodge*, 225 U. S. 246. It is true that it is the province of this court to inquire whether the decision of the state court rests on a fair or substantial non-Federal basis. We submit that the result of such inquiry will show that the non-Federal basis of the state court decision was adequate and that appellants have completely failed to sustain the burden which rests upon them, of affirmatively showing jurisdiction in this court. *Gorman* v. *Washington University*, 316 U. S.

98, 62 S. Ct. 862, l. c. 864; *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857.

II.

The appellees' MOTION TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' STATEMENT OF POINTS ON WHICH THEY INTEND TO RELY was well grounded, and abundantly justified appropriate action thereon by this court, and did not constitute a waiver or abandonment of appellees' right to be heard on the MOTION TO DISMISS OR AFFIRM.

A.

Appellants quoted (Response, p. 2) from Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Section 364, page 752. As they failed to note or heed the first sentence of the paragraph in which said excerpt appears, we quote the paragraph, indicating the part so omitted by italics, as follows:

> "*The purpose of the requirement of a statement of points to be relied upon is to afford appellant a further opportunity to weed out prolix, defective or unnecessary assignments of error.* Where counsel are satisfied with the assignment of errors, it is a common practice to file a statement adopting the assignment of errors as the statement of points required by Rule 13."

Here, instead of heeding such admonition, appellants attempted to add two additional assignments, while seeking to adhere to all previous ones.

In the same work, Section 357, page 728, which section was used as a footnote to the above quoted section, the authors say:

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"The assignment of errors should 'present to the court a clear and concise statement of material points on which the plaintiff in error (appellant) intends to rely,' for the purpose of enabling 'the court and opposing counsel to see on what points plaintiff's (appellant's) counsel intend to ask a reversal of the judgment, and to limit the discussion to those points.' Undue prolixity defeats this purpose, and fault in that respect may be taken by the court as sufficient ground for the dismissal of the appeal. The presentation of 'jumbled assignments,' lacking in clarity, may also result in dismissal."

Appellants, we believe, have violated the rules of this court in each of the several respects mentioned, and justified the sustaining of our motion to strike out.

B.

Even if appellants may adopt as a statement or designation of points, the Assignment of Errors theretofore filed, we contend that under the rules of this court, appellants, in making such designation, cannot state points not embraced within their Assignment of Errors filed in the state court (Rule 9; Rule 13, Subdivision 9, of this court).

Furthermore, our Motion to Strike is leveled in part against the vague, indefinite, uncertain and prolix Assignment of Errors. This applies not only to the original Assignment of Errors, but also to the alleged Points and the additional Assignment of Errors included therein. Regardless of what alleged errors may have been committed by the state court, they can only be urged in the Supreme Court of the United States if brought before this court by revealing assignment of errors.

As will elsewhere appear in this REPLY, in Subdivision I of their belated additional assignment of errors, under caption, "STATEMENT OF POINTS, Assignment

of Errors," appellants now attempt to allege error on grounds not set forth in the original Assignment of Errors. An examination of the original Assignment of Errors will disclose that no such assignment of errors as those so set forth anywhere appear in the original Assignment of Errors filed in the state court in connection with the appeal, nor will there be found therein any assignment of errors which makes the real contention now so tardily advanced that the right to sue jointly herein was claimed by the appellants as a part of the rights accruing under the Civil Rights statutes.

Appellants in their RESPONSE do not make any satisfactory explanation of the reasons which caused them to incorporate Subdivision II as a point as well as an additional assignment of error. If it be their purpose to incorporate the alleged errors set forth under the "twenty-two numbered assignments" filed in the Missouri Supreme Court as grounds for the reversal of the judgment of the lower court, then it must be clear under the authorities herein cited that appellants cannot, under the rules of this court, make additional assignments of error by incorporating matters not appearing in the original Assignment of Errors filed in this court, and, furthermore, that they cannot designate as a point relied upon matters not incorporated in the original Assignment of Errors filed in connection with the appeal. If this be their purpose, instead of having made the 37 assignments set forth in their Assignment of Errors, they would be making 59 assignments of error, and the additional 22 assignments would be flagrantly violative of the rules of this court.

Appellants now accuse appellees of bad faith because they attempted to answer and comment upon matters to which the original assignments refer, pointing out assignments connected therewith. Appellees were powerless to

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do otherwise because under the rules of this court it was mandatory that our Statement Opposing Jurisdiction be filed in the state court within a prescribed time. That this burden cast upon the appellees was unjustifiably heavy is, we think, too apparent to admit of any controversy. Appellants have not only attempted to create this excessive burden by their prolix, repetitious, obscure Assignment of Errors, but also in their designation of points, concerning which the duty of the appellants to the appellees is the same, and to the court even greater.

On page 2 of the RESPONSE, appellants say:

> "Points I and II are not additional assignments of error and there is no rule requiring the statement of points to be relied upon to be filed in the lower court."

On pages 3 and 4 of the RESPONSE, appellants criticize appellees for the omission or elimination of the opening sentence in their document entitled, "APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13," which reads as follows:

> "Come appellants in the above entitled cause and adopt their Assignment of Errors in this court, *supplemented* by the following numbered Points I and II, as their statement of points to be relied upon; * * *" (Emphasis ours.)

There is no basis for the suggestion that appellees eliminated this recital or any part thereof. It should be noted that appellees' motion does not quote the recitals in this document. Quite significantly, however, appellants themselves have eliminated the following very significant part of this document immediately following the opening sentence above referred to, to-wit:

"STATEMENT OF POINTS

Assignment of Errors"

Appellants apparently now contend that it was not their intention to use the words "Assignment of Errors" therein, and that the recitals in subdivisions I and II did not constitute assignments of errors. The fact that they are also referred to as points has no significance because it was the apparent purpose of appellants to state to this court that they adopted the original assignment of errors supplemented by the assignment of errors set forth under subdivisions I and II, and submitted all of the same as their statement of points to be relied upon.

On page 4 of the RESPONSE, appellants refer to the case of *Bompart* v. *Lucas*, 32 Mo. 123. It seems to us that if the pronouncements of the court therein have any significance they apply to the appellants, on account of their very significant elimination from their brief of the words "Assignment of Errors." We shall refer to that case again herein.

Considering the purpose of these rules, it seems to us that in the present situation, if appellants are permitted to file additional assignments of errors after the time prescribed by the rules and by the law, it would give appellants greater latitude than the rules contemplate, and to the same extent improperly burden appellees, in submitting the case. Under such circumstances appellees would be put to great disadvantage, because they could not have anticipated that appellants would attempt to later add additional assignments of errors which appellees would have no opportunity to discuss in their Statement Opposing Jurisdiction. Appellants have not even attempted to explain why they used the words "Assignment of Errors" as a part of the caption to subdivisions I and II of

"APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13." This entire document should be read in the light of what is said above, because appellants' silence has, we think, real significance.

C.

Appellants state (RESPONSE, p. 4) that appellees in their Suggestions Opposing Jurisdiction, have failed to discuss certain assignments of error (which are largely repetitious of each other and of other assignments), and insinuate on page 5 that this failure was because "they can offer nothing to palliate the errors there specified."

We called the court's attention to the duplications, prolixity, obscurity and indefiniteness of these assignments in the Foreword to our discussion on pages 2-6 of our STATEMENT OPPOSING JURISDICTION, in which we said:

> "We regret the length of these suggestions but feel compelled to discuss the question involved at some length because of the long, involved and confusing Assignments of Error and Jurisdictional Statement filed by appellants. Appellants' Assignments of Error cover some six and one-half crowded pages of typewriting. Their Jurisdictional Statement covers more than thirty-three crowded typewritten pages, exclusive of exhibits."

We attempted to discuss and present as best we could under the circumstances the elements in the case which seemed relevant to the question whether or not the jurisdiction of this court was present and whether or not the appeal should be dismissed, referring only for the convenience of this court to certain of appellants' assignments of errors. We endeavored to preserve a logical order of presentation in spite of the confusion in appel-

lants' Jurisdictional Statement and Assignment of Errors. In Paragraph XV of our STATEMENT, pp. 108, 109, we stated the purpose of appellees. As fully as possible under the circumstances we have answered, at least in principle, every contention which under any circumstances could be involved on the questions properly before the court for determination, making such apt references thereto as time permitted, although in some instances we did not refer to the assignments by numbers. Under Subdivision E of this Point II of this REPLY, we have referred to Assignment 30 and have also referred to same under Point I of this REPLY. In Point I we also refer to and discuss Assignment 24.

D.

On page 9 of said RESPONSE appellants say:

> "Appellees' response to the citation informs this court that if it determine that it has jurisdiction '• • • appellees desire to file briefs and to be heard before the court at the times and in the manner provided by the rules of the court.'"

Therefrom appellants seem to contend that appellees invited the court to grant them a hearing on the merits without first passing upon the motion to dismiss or affirm.

This quotation is taken from the response filed in this court by appellees to the citation in customary form issued to appellees by the Supreme Court of Missouri on the 21st day of June, 1946, and we refer to the same as found in full in the transcript. As same is not now available to us, we call attention to the fact that same contains a paragraph referring to the document entitled APPELLEES' SUGGESTIONS OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM JUDGMENT, filed

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on July 6, 1946, and the motion therein contained to dismiss the appeal or affirm the judgment. The last two paragraphs of this response are as follows:

> "The undersigned appellees respectively and respectfully state that in their opinion the grounds asserted in said document are sufficient to justify the sustaining of the said motion to dismiss said appeal or affirm said judgment; and hereby request consideration thereof by the court.
>
> The undersigned appellees further respectfully state that, if for any reason the aforesaid motion to dismiss or affirm be denied by the court or be not sustained by the court, or if the court determines that it has jurisdiction, the appellees desire to file briefs and to be heard before the court at the times and in the manner provided by the rules of the court."

We respectfully suggest that nothing contained in this response could by any contortion of language be construed as constituting a waiver by appellees of the right to be heard upon their motion to dismiss or affirm.

On pages 3 and 11 of their RESPONSE appellants intimate that by attacking their assignments of errors, appellees have waived their motion to dismiss or affirm and conferred appellate jurisdiction on this court. If appelles had not filed such Motion (to strike) promptly, and before a ruling on their Motion to Dismiss or Affirm, appellants would have contended that the attack on their assignments of errors and statement of points to be relied upon came too late. Appellate jurisdiction cannot be conferred on this court by waiver or even by consent of the parties, since it will look into its own jurisdiction even where such jurisdiction is not questioned by appellee or defendant in error. *Burnett* v. *Kinkel*, 264 U. S. 16, 19, 44 S. Ct. 254, 255, 77 L. Ed. 730. See to like effect, *Arnold* v.

United States, 263 U. S. 427, 435, 44 S. Ct. 144, 147, 68 L. Ed. 371.

Appellants' claim of jurisdiction in this court is therefore not enhanced by this intimation of waiver which is untenable.

E.

Appellants question our authorities cited to demonstrate the insufficiency of appellants' assignments of errors and assert that the citing of such authorities discloses "that the authorities as a whole destroy their contention" (RESPONSE, p. 16).

To demonstrate that the weight of authority supports our contention we quote from 3 C. J. 1398, Sec. 1550, as follows:

> "According to the weight of authority, an assignment of errors should be complete in itself and should not require reference to extrinsic matter to determine the question intended to be presented thereby."

and from 3 C. J. 1361, Sec. 1505, as follows:

> "* * * and it is held that each assignment or specification of error must be complete in itself and self-explanatory, and that it cannot be aided by an examination of the record as a whole or even by express reference to other parts of the record."

See, also, to like effect, 4 C. J. S. 1809, Sec. 1285, and 4 C. J. S. 1756, Sec. 1253. This principle is also supported by our complete quotation from appellants' own authority, Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, page 752, Sec. 354.

Appellants flagrantly violate the provisions of Rule 9, requiring assignments of error to set out separately and

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particularly each error asserted, in Assignment No. 30, reading as follows:

> "30. The court erred in holding that the fifth amended petition did not state a cause of action, did not state a joint cause of action, and that there was a misjoinder of parties plaintiff and causes of action, and that Sections 922 and 948, repealed fifteen months before the affirmance of the judgment, justified the judgment of dismissal and penalty, in violation of appellants' rights under the XIVth Amendment."

This very indefinite assignment, if properly construed, not in the light of the indefinite language thereof, but in the light of other parts of the record, can be properly said to attempt to set out at least five separate and distinct alleged errors.

F.

The practice of appellants' counsel in quoting excerpts from a decision, an opinion, a document or statement, thereby wresting and stripping same from the context so as to create an erroneous impression is evidenced by the frequent employment of such methods. We have heretofore referred to this practice in connection with other parts of the RESPONSE relating to quotations from the document entitled "APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13." We feel that in this connection we should quote the following initial sentences in Paragraph II of the last-named document:

> "The opinion of the Supreme Court of Missouri, by its statement that (820):
>
> "'Apellants claim error under twenty-two numbered assignments, some being mainly a repetition

of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately.' "

And by the further statement (827):

"None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action."

Appellants again quote the last sentence of this language on page 15 of the RESPONSE, and reproduce both clauses on page 17 of the RESPONSE. These quotations respectively appear on pages 820 and 827 of the transcript. Inasmuch as the transcript is not available to appellees, we refer to the places where these references appear in the opinion of the Supreme Court of Missouri, in this case (193 S. W. (2d) 588), on page 589, and on page 592 thereof. Same are separated by many intervening recitals dealing with numerous contentions made by appellants. So that same may be read in the light of the context, we reproduce the full paragraph on page 589 *id.*, of which the first quoted excerpt is a part (and indicate the quoted parts by the use of italics), as follows:

"The fifth amended petition, with attached exhibits, occupies two hundred pages of the printed record. The briefs are numerous and lengthy, aggregating thirteen hundred and fifty pages, citing and quoting from hundreds of decisions, many of which, we think, have no relevancy to any issue here involved. *Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately.*"

And also reproduce from page 592 *id.* the full paragraph from which the last quotation is taken (and indicate the quoted parts by the use of italics) as follows:

> "Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803, and the 'due process' and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. *Moffett* v. *Moffett,* 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; *Clark* v. *Andrews,* 136 Kan. 23, 12 P. (2d) 294; *Clark* v. *Moffett,* 136 Kan. 711, 18 P. (2d) 555; *Id.* 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; *Moffett* v. *Robbins,* D. C., 14 F. Supp. 602; *Moffett* v. *Robbins,* 10 Cir., 81 F. (2d) 431, *Id.,* 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1937. Appellants have not been denied due process. They have not only had their day in court, but their months and years. *None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action.*"

On pages 52 to 71 of our Statement Opposing Jurisdiction we discuss this paragraph of the opinion, and also refer to and discuss many of the authorities therein cited.

It must be manifest from a most casual reading that the words quoted on page 589 have no reference to the assignments specifically mentioned on page 592, because the assignments last referred to are the specific assignments mentioned on page 592.

Whatever may have been the intention of counsel for

appellants in this regard, we insist that the manner in which appellants have quoted these two sentences is at least calculated to create an enormous impression, which would not obtain if consideration is given to all of the recitals in the document. We therefore respectfully insist that the pronouncement in the case of *Bompart* v. *Lucas*, 32 Mo. 123, l. c. 124, quoted on page 4 of appellants' RESPONSE is applicable, not to the appellees, but to the appellants.

Respectfully submitted,

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